APR 17 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

MARCH TERM, 1956.

No. 870

MICHAEL CONFORTI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF PUTNAM COUNTY, STATE OF NEW YORK

WOLFANGO EDWARD CRIBARI,
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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Michael Conforti, respectfully represents the following:

A.

Summary Statement of Matter Involved.

The petitioner, Michael Conforti, was convicted of the Crime of Manslaughter in the First Degree, after trial before the Hon. John P. Donohoe, and a jury in the County Court of Putnam County, State of New York. The jury deliberated approximately seven hours. Petitioner was

sentenced to a term of not less than fifteen years nor more than thirty years, as a second felony offender under the laws of the State of New York, the prior felony being based upon a conviction of Attempted Extortion in 1934, about twenty years prior to the instant conviction. Petitioner was originally indicted for the Crime of Murder in the Second Degree. The jury as above stated found him guilty of the next lower degree of homicide under the laws of the State of New York, Manslaughter in the First Degree.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Department, which, on March 22nd, 1955 (285 App. Div. 973), unanimously affirmed the judgment of conviction. (See Decision and Opinion of the Appellate Division, Appendix.)

An appeal was thereafter taken, by permission of an Associate Justice of the said Appellate Division of the Supreme Court, to the Court of Appeals of the State of New York, which on December 28th, 1955 (309 N. Y. 923), unanimously affirmed the said judgment of conviction, without opinion. (See Decision of the Court of Appeals, Appendix.)

B.

Grounds Upon Which Jurisdiction of This Court Is Invoked.

The date of petitioner's judgment of conviction and sentence in the County Court of Putnam County, State of New York, was February 5th, 1954. (See judgment of County Court of Putnam County, Appendix.)

Petitioner respectfully submits that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1256 of Title 28, U. S. C., and Rule 19 of the Rules of the Supreme Court of the United States.

Upon his appeal to the Appellate Division and to the Court of Appeals of the State of New York, petitioner, invoking the protection of the Fourteenth Amendment, challenged the fairness of his trial and contended that he had been deprived of due process of law.

Although in petitioner's brief before the Court of Appeals, petitioner specifically argued that he had been deprived of a fair trial and due process of law (See Decision of Court of Appeals, Appendix), the Court of Appeals, on February 17th, 1956, denied a motion made to amend its remittitur so as to provide that a question under the Fourteenth Amendment was necessarily passed upon by it in its decision herein.

C.

Question Presented for Review.

Whether the right of a defendant to be accorded due process of law and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States has been invaded and violated:

When a Trial Court charges (fol. 3232, Record), upon the question of the burden of proof, as follows: "The law says the People must prove the guilt of the defendant beyond a doubt based in reason, *it does not say the People must prove the guilt of a defendant beyond all reasonable doubt.*" (Emphasis ours.)

D.

The Constitutional Provisions and Statutes Involved in the Case.

United States Constitution, Amendment XIV, Section 1: "• • • nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Criminal Procedure of the State of New York, Section 389: "A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."

E.

Concise Statement of Case and Material Facts.

The indictment charged that the petitioner "in the Town of Patterson, County of Putnam and State of New York, on or about the 2nd day of January, 1953, wilfully and feloniously and with a design to effect the death of Grace Conforti, shot and killed the said Grace Conforti with a 12 gauge shotgun, said act not being justifiable or excusable." Grace Conforti was the wife of the petitioner.

The People's case was based entirely upon circumstantial evidence and the deductions therefrom made by a medical witness and a ballistics expert. It was the theory of the prosecution, and we use this term advisedly, that petitioner had shot and killed his wife, wilfully and designedly, while she was lying in bed in their home on Dog Street, Towners, Putnam County, New York. Petitioner took the stand in his own defense and testified that his wife had been accidentally shot during a struggle for a shotgun which she had pointed at and threatened him with, after a quarrel, brought about by an admission of infidelity on her part.

It has been the contention of petitioner in this matter that the case of the prosecution rested entirely (a) upon the opinion of the medical examiner of Putnam County, one Dr. Genovese, that the deceased was shot while she was lying in bed, in spite of the fact that although there were wounds of exit in the buttocks of the deceased, no holes were found in the bedding underneath her and only four of the eight or nine pellets, conceded to be

in such a shell, were found, three in the body upon the autopsy and one which rolled out when the body was rolled over by the officials upon the bed, none being found in the bed, and (b) upon the opinion of a ballistics expert, a member of the police department of the City of New York, attached to the Ballistics Bureau of that department, that the deceased could not have been shot during a struggle for the gun, and this again in the face of the results of certain tests which were produced in the court room and an actual demonstration by a ballistics expert called by the defense clearly proving that the deceased could have been accidentally shot in the struggle as described by the petitioner.

It is the fact that this case was entirely circumstantial outside of the testimony of the petitioner which further emphasizes the serious effect of the error in the Court's charge to the jury.

F.

Stage of Proceedings and Manner in Which Constitutional Questions Were Raised in the Courts Below.

No exception was taken in the Trial Court. The question was raised, however, upon the appeal to the Appellate Division of the Supreme Court, Second Department (See Decision and Opinion of Appellate Division, Appendix), and upon the appeal to the Court of Appeals (See Decision of Court of Appeals, Appendix).

G.

Reasons Relied Upon for the Allowance of the Writ.

The Court of Appeals of the State of New York has decided a federal question of substance not heretofore determined by this Court or in a way probably not in accord

with the applicable decisions of this Court. (Rule 19 of the Rules of the Supreme Court.)

While this precise question was not presented to this Court in *Buchalter* v. *New York*, 319 U. S. 427, and counsel for petitioner have not been able to find a case before this Court where the exact question involved here was presented, the language of the *Buchalter* case would appear to be exactly in point when this Court said, at page 429: "The due process clause of the Fourteenth Amendment requires that action by a State through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as the 'law of the land'. Where this requirement has been disregarded in a criminal trial in a State Court this Court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee."

Section 389 of the Code of Criminal Procedure of the State of New York provides as follows: "A defendant in a criminal action is presumed to be innocent, until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."

This statutory provision affords to all the citizens of the State of New York the protection of this fundamental principle of liberty and justice which lies at the base of our institutions. It is true that no exception was taken by counsel for petitioner to this error upon the trial. The effect of the affirmance by the Court of Appeals of the State of New York, therefore, is that such an error upon the part of the Trial Court, when coupled with the inattentiveness or negligence of counsel, may bring about a complete change in the application of the fundamental principle of law governing the trial of a criminal case and deprive an accused of the protection of the presumption of innocense.

It is true that the Trial Court had previously charged correctly as to the burden of proof, the presumption of innocence and reasonable doubt (fols. 3220-3232, Record). But the erroneous instruction *came at the very end* of the charge upon the subject (fol. 3232, Record), and because of this must have left a lasting impression on the jury. It is impossible to say whether the jury followed the correct or incorrect instruction. The argument that because the trial court had previously charged correctly, the error may be ignored, may be best met by the language of the Court of Appeals of the State of New York itself, in *People* v. *Kelly*, 302 N. Y. 512, an analogous case, where the defense was insanity and the trial court charged correctly and then incorrectly upon that question. The Court of Appeals said at page 512: "It is urged upon us, however, that since the Court in earlier parts of the charge quoted the language of section 1120 and properly noted with reference to the two subdivisions thereof that 'one or the other of those two things is all that can excuse' we should assume that the jurors—each of the twelve of them—followed the court when it was correct and disregarded the charge when it was incorrect. In other words, we are asked to assume that the jurors, faced with two opposite and mutually exclusive charges as to the rule, had the wit and ability, with unanimity, to adopt the right one and reject the wrong one. We think the statement of the thought contains its refutation."

In the Courts below it was urged and undoubtedly will be urged upon this application that no exception was taken in the trial court to the mis-statement of this fundamental principle, an error which went to the very heart of our system of criminal justice, the burden of proof, and that, therefore, this Court has no power to review or rectify this most serious error, which constituted, as we have said before, a complete departure from our system of criminal justice. However, the question was presented to the Appellate Division of the Supreme Court of the State of New

York (See Decision and Opinion of Appellate Division, Appendix) and to the Court of Appeals of the State of New York (See Decision of Court of Appeals, Appendix). It is respectfully submitted that this fundamental safeguard, designed to protect the petitioner in his presumed innocence, may not be disregarded and cannot be waived by the failure to take an objection or to take an exception. If it may, then an error of the Court when coupled with the inattentiveness or negligence of counsel, as we have heretofore said, may accomplish that which even the elected representatives of the people may not do.

Petitioner respectfully submits that the foregoing presents a good and sufficient reason for allowing the writ of certiorari in the case at bar.

WHEREFORE, your petitioner, Michael Conforti, prays that a writ of certiorari may issue out of and under the seal of this Court to the County Court of Putnam County, State of New York, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein, as heretofore remitted to the said County Court of Putnam County by the Court of Appeals, of the State of New York; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated March 16th, 1956.

MICHAEL CONFORTI,
Petitioner,

By WOLFANGO EDWARD CRIBARI,
Counsel for Petitioner.

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that in my opinion it is well founded and the cause is one in which the petition should be granted.

WOLFANGO EDWARD CRIBARI,
Counsel for Petitioner.

APPENDIX A.

Decision of Court of Appeals of the State of New York (309 N. Y. 923).

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the second judicial department, from a judgment of said court, entered March 22, 1955, affirming a judgment of the County Court of Putnam County (John P. Donohoe, J.), rendered upon a verdict convicting defendant of the crime of manslaughter in the first degree. The indictment charged defendant with the crime of murder in the second degree in that defendant "in the Town of Patterson, County of Putnam and State of New York, on or about the 2nd day of January 1953, wilfully and feloniously and with a design to effect the death of Grace Conforti, shot and killed the said Grace Conforti, with a 12 gauge shotgun, said act not being justifiable or excusable." In the Court of Appeals appellant argued that the evidence was insufficient to warrant a finding of guilt beyond a reasonable doubt; that the court should not have permitted the coroner to express his opinion that deceased was in bed when she was shot and should not have permitted a witness for the People to express his opinion that it would have been impossible for deceased to discharge the shotgun herself; that error in the charge upon the subject of reasonable doubt deprived appellant of a fair trial and due process of law; that the charge upon the question of circumstantial evidence was improper, and that the action of the court in recalling the jury to the courtroom during their deliberations was improper.

William F. Horan, for appellant.

Fred A. Dickinson, District Attorney (Frank C. Bowers, Jr., of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: Conway, Ch. J., Desmond, Fuld, Froessel, Van Voorhis and Burke, JJ. Taking no part: Dye, J.

APPENDIX B.

Decision and opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (285 App. Div. 973).

Judgment of the County Court of Putnam County, convicting appellant, after trial, of the crime of manslaughter in the first degree and imposing sentence, unanimously affirmed. If it be assumed that it was error to permit the witnesses, a physician and a detective, to state their opinions, the former that the deceased was shot while in bed and the latter that it was impossible for her to have shot herself (see People v. Creasy, 236 N. Y. 205, and Kennedy v. The People, 39 N. Y. 245), defendant's guilt was clearly established by the other proof in the record, and the error was inconsequential and did not affect the substantial rights of appellant (see Code Crim. Proc. sec. 542). The instruction by the court to the jury, in one particular instance, that the People did not have to prove appellant's guilt beyond all reasonable doubt obviously was an inadvertence and did not mislead the jury, in the light of the fact that the court had just before that fully and accurately stated the rule concerning reasonable doubt. No exception was taken to this instruction and it is not to be doubted that, had exception been taken, the court would have corrected the inadvertence. No separate appeal lies from the order denying the motion for a new trial, which has been reviewed on the appeal from the judgment of conviction.

Present—Nolan P. J., Wenzel, MacCrate, Schmidt and Beldock, JJ.

APPENDIX C.

Judgment of the County Court of Putnam County, State of New York.

February 5, 1954
Hon. John P. Donohoe, presiding.
Court convened at 11:37 a. m.

PEOPLE OF THE STATE OF NEW YORK
v.
MICHAEL CONFORTI, resumed.

Defense Counsel, James Dempsey, made the following motion:

MR. DEMPSEY: At this time if Your Honor please, I move to dismiss the indictment against this defendant upon the ground that the prosecution has failed to establish facts sufficient to sustain the indictment as a matter of law, either with respect to the charge as alleged in the indictment, to wit, murder in the second degree, or any other charge which would be encompassed within the scope of that nature of indictment, upon the ground that the testimony introduced to the point where the Prosecution has rested, itself indicates it affirmatively appears that the Prosecution has not as a matter of law established the guilt of this Defendant beyond a reasonable doubt of the crime of murder in the second degree, or for any other offense.

I therefore request that the indictment be dismissed and the Defendant be discharged from custody.

THE COURT: I will deny the motion.

MR. DEMPSEY: I respectfully except.

The sentence of the Court is that defendant Conforti, having been found guilty of manslaughter, First Degree on January 29, 1954, and his record having been taken on that date, that he be sentenced to Sing Sing Prison for an indeterminate term of the minimum to be not less than fifteen years or the maximum to be not more than thirty years.

COURT ADJOURNED.

W. BOYNTON TOWNER,
Special Deputy Clerk of Court.